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Supreme Court, U.S.
FILED

No. 09-1301 APR 5 - 2010

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In the
Supreme Court of the United States

EDUARDO CECENA, MARIA CECENA, husband and wife,
Petitioners,

v.

ALLSTATE INSURANCE COMPANY and
MICHAEL ROMERO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EDUARDO AND MARIA CECENA
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April 5, 2010

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QUESTION PRESENTED

Since the Appellate Court ruled the District Court erred in finding Fraudulent Joinder, did Appellate Court err in failing to follow Article III, section 2 of the U.S. Constitution, *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918) and *Hunter v. Philip Morris, USA*, 582 F.3d 1039 (9th Cir. September 28, 2009, Tashima, J.) by finding federal subject-mater jurisdiction when the Petitioners Cecenas did not voluntarily dismiss the nondiverse Defendant Allstate Insurance Company Agent Michael Romero?

LIST OF PARTIES

Petitioners:
Eduardo and Maria Cecena

Respondents:
Allstate Insurance Company
Michael Romero

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Eduardo and Maria Cecena respectfully petition for writ of certiorari to review the Judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Court of Appeal is not officially reported, and reproduced in the Appendix herein at 1a-8a. The decision of the District Court for the Northern District of California is not officially reported and is reproduced in the Appendix at 9a-18a.

JURISDICTION

The judgment of the court of appeals was issued on November 18, 2009. Pets. App. 1a-8a. Petitioners' timely petition for rehearing and rehearing en banc was denied on January 5, 2010. Pets. App. 19a-20a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE III

Section 1.

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT

This case concerns noncompliance with the jurisdictional requirements of Art. III, Section 2 of the U.S. Constitution by allowing federal court subject matter jurisdiction when defective Removal was not "cured". Since the Appellate Court found the DC erred in finding Fraudulent Joinder, "cure" of this defect could only occur by Petitioner Cecenas' voluntary dismissal of him, which did not occur. *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918). The finding is a question of exceptional importance, and conflicts with *Hunter v. Philip Morris, USA*, 582 F.3d 1039 (9th Cir. September 28, 2009) and other courts of appeal and the Supreme Court, and substantially affects a rule of national application.

REASONS FOR GRANTING WRIT

Article III, section 2 of the U.S. Constitution limits federal court jurisdiction, including requiring cases between citizens of different states. The Appellate Court found the Cecenas' cause of action against Romero was legally sufficient, and that the District Court erred in finding Fraudulent Joinder.

Yet, the Appellate Court ruled complete diversity existed at time of Judgment. That Court's reasons were: 1) the District Court dismissed Romero, and 2) there was no appeal of that Dismissal.

The Appellate Court relied on *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996), which involved the nondiverse party being *voluntarily dismissed* from the suit prior to Judgment, and the respondent Lewis *admitting* diversity became complete when dismissal occurred. *Caterpillar* found no "jurisdictional defect" at time of the district court Judgment.

However, the general rule is dismissal of resident defendants does not create diversity unless done by *voluntary action by the plaintiff*. *Great N. Ry. v. Alexander*, 246 U.S. 276, 281-282 (1918).

The Cecenas did not dismiss Romero; the District Court ordered it. Therefore, defective jurisdiction was not "cured". Upholding the District Court Judgment would "work a wrongful extension of federal jurisdiction and give the district courts power the Congress has denied them." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

The Appellate Court erred in claiming waiver of the jurisdictional defect because:

1) Defective subject matter jurisdiction could only be "cured" by a dismissal by the Cecenas.

2) In *Hunter v. Philip Morris USA, supra,* the district court found Fraudulent Joinder, denied a Remand Motion, and granted a Fed. Rule Civ. Proc. § 12(b)(6) Motion. Hunter appealed the Remand Order, and the court, like here, found Joinder was not Fraudulent, and, unlike here, ordered Remand. Hunter did not waive his Remand appellate rights by not appealing the district court's dismissal order.

3) The Appellate Court erred in overlooking that its finding of Nonfraudulent Joinder *necessarily* meant the District Court should not have dismissed Romero. The Appellate Court too narrowly read its own decision.

4) Defects in jurisdiction can be raised at any time. *Shabazz v. Carroll*, 833 F.2d 149 (9th Cir. 1987).

5) *Caterpillar v. Lewis,* supra, at p. 76-77 states:

> Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated. See Fed. Rule Civ. Proc. 12(h)(3)

6) Considerations of "finality, efficiency, and judicial economy" do not relate to a jurisdictional

defect continuing to Judgment. *Caterpillar v. Lewis, supra*, at p. 73-77.

CONCLUSION

Petitioners request their Writ of Certiorari be granted. The lower court jurisdictional decisions fail to comply with long-established Supreme Court law. Reversal and remand is necessary to protect Petitioners' rights, and the respective jurisdictions of our State and Federal Courts.

Respectfully submitted,

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APRIL 2010

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16710
D.C. No. 5:05-cv-03178-JF

[Filed November 18, 2009]

EDUARDO CECENA; MARIA CECENA,	)
	)
Plaintiffs - Appellants,	)
	)
v.	)
	)
ALLSTATE INSURANCE COMPANY,	)
	)
Defendant - Appellee.	)
	)

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jeremy Fogel, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted October 5, 2009
San Francisco, California

Before: SCHROEDER and BERZON, Circuit Judges, and STROM,** District Judge.

Plaintiff/Appellants Eduardo and Maria Cecena appeal various of the district court's rulings in this case. We affirm.

I. Jurisdiction

Ordinarily, "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). There is now some authority in California case law holding insurance agents liable for common law fraud or negligent misrepresentation. *See McNeill v. State Farm Life Ins. Co.*, 116 Cal. App. 4th 597, 603 (Cal. Ct. App. 2004). The district court therefore erred by holding that the Cecenas fraudulently joined Michael Romero in the First Amended Complaint, which alleged common law fraud and negligent misrepresentation and was filed in state court before removal.[1]

We nevertheless decline to order remand. "[A] district court's error in failing to remand a case improperly removed is not fatal to the ensuing

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** The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

[1] *Mercado v. Allstate Insurance Co.*, 340 F.3d 824, 826 (9th Cir. 2003), did not involve allegations of common law fraud or negligent misrepresentation.

adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996). There was unquestionably complete diversity when judgment was entered in this case, because all claims against Romero were stricken by the district court, and no appeal has been taken from those orders.

II. Motion to Amend to Add Promissory Fraud

A party "alleging fraud . . . must state with particularity the circumstances constituting fraud," Fed. R. Civ. Pro. 9(b), including the "time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation," *Misc. Serv. Workers, Drivers & Helpers, Teamsters Local No. 427 v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981). As the Cecenas did not meet this standard with regard to the promissory fraud claim, we affirm the denial of leave to amend.

III. Dismissal for Failure to State a Claim

The Cecenas waived their challenge to the dismissal of claims under California Insurance Code §§ 10102 and 10103 because they did not present a legal argument to support the challenge in their opening brief. *See Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). The Cecenas also waived any claim that they qualify for injunctive relief under California Business & Professions Code § 17200, because they presented in their opening brief only a conclusory statement that such relief is due. *See id.*

We affirm the district court's dismissal of the California Business & Professions Code § 17200 claim

for restitutionary relief. A plaintiff may obtain as restitution only money that was once in his possession or money in which he has a vested interest, such as unpaid wages for work performed. *See Korea Supply Co. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149–50 (Cal. 2003). "[N]onrestitutionary disgorgement" is not permitted. *Id.* at 1150–51. The Cecenas do not have a property interest in any money that should have been paid to them by Allstate under their policy but wasn't and so are not entitled to restitution.

IV. Summary Judgment

A. Breach of Contract and/or Bad Faith Claims

1. The Cecenas did not request payment for reimbursement of benefits for comparable rental housing and mileage. Allstate therefore did not breach its contract with the Cecenas by failing to provide them such benefits. Nor did the Cecenas' insurance policy require Allstate to make disclosures of Additional Living Expenses ("ALE") benefits beyond those contained in the policy.

2. Allstate paid the Cecenas the full amount of the cost estimate bid by DMC. It also paid the amount of money to which the Cecenas would have been entitled had their policy included building code coverage and a portion of the engineering fees for a new house, although no payment was due for these two expenses under the policy terms. The Cecenas introduced no evidence that they submitted timely estimates to Allstate for additional repair costs not included in the DMC estimate. The Cecenas therefore cannot show that they suffered harm from Allstate's alleged breach

of contract or that Allstate acted in bad faith with regard to the Cecenas' structural repairs, including asbestos abatement.

3. Eduardo Cecena and his son Andy clearly stated during their depositions that the trees were damaged during construction of the new home, not during the fire. Because the policy "applies only to direct physical loss caused by fire," there is no basis for a finding of breach of contract or bad faith for failure to pay for the tree damage.

4. With regard to personal property, the Cecenas' policy states that "[i]f you do not repair or replace the damaged, destroyed or stolen property, payment will be on an actual cash value basis. This means there may be a deduction for depreciation." The Cecenas offer no evidence that they actually replaced the items that were destroyed, but Allstate paid the Cecenas actual cash value plus the depreciation value that had been withheld anyway. This additional payment would more than cover any unduly low payments resulting from the use of sale prices by Allstate's adjuster in valuing the claim. Moreover, the Cecenas' policy did not cover shipping charges unless incurred as a result of the actual replacement of destroyed property. Because the Cecenas did not provide proof of replacement, Allstate did not breach the contract or act in bad faith when it did not pay these costs.

B. Negligence

We affirm the district court's grant of summary judgment to Allstate on the Cecenas' negligence claim. The record is devoid of evidence that Romero misrepresented the policy, failed to procure coverage

that the Cecenas requested, or held himself out as having special expertise to give rise to an independent duty of care. *See Fitzpatrick v. Hayes*, 57 Cal. App. 4th 916, 927 (Cal. Ct. App. 1997). As a result, Allstate is not liable for negligence, because it did not have a duty to provide different or better coverage. *See Cal. Serv. Station & Auto. Repair Ass'n v. Am. Home Assurance Co.*, 62 Cal. App. 4th 1166, 1180 (Cal. Ct. App. 1998).

V. Judgment as a Matter of Law

A. The district court properly determined that 10 California Administrative Code § 2695.4 does not establish a per se rule requiring Allstate to discuss potential types of ALE expenses with the insured. Section 2695.4 applies to disclosure of "all benefits, coverage, time limits or other provisions of any insurance policy." By its plain language, it refers to "provisions" of an insurance policy, not specific ways in which a provision covering benefits might apply.

Current California Insurance Code § 2060 confirms our conclusion. This statutory provision requires precisely what the Cecenas assert 10 California Administrative Code § 2695.4 already required at the time of their claim. The Cecenas' interpretation of § 2695.4 would make the California Legislature's later passage of current § 2060 redundant.

B. We affirm the district court's judgment as a matter of law on the Cecenas' fraud, bad faith, and Business & Professions Code § 17200 claims.

There was no evidence at trial that could support the assertion that Allstate had the intent to defraud and knowledge of falsity requisite for a fraud claim

under California law. *See Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1268 (Cal. Ct. App. 1989).

Nor was there sufficient evidence for a reasonable trier of fact to conclude that Allstate acted in bad faith. An insurer's "honest mistake, bad judgment or negligence" does not constitute bad faith. *Adelman v. Associated Intern. Ins. Co.*, 90 Cal. App. 4th 352, 369 (Cal. Ct. App. 2001) (internal alterations and quotation marks omitted). There is no evidence in the record on which a reasonable trier of fact could find that Allstate's actions amounted to more than a mistake or bad judgment.

Finally, we affirm the district court's holding that the Cecenas could not prevail on their § 17200 claim by "show[ing] either an (1) 'unlawful, unfair, or fraudulent business act or practice,' or (2) 'unfair, deceptive, untrue or misleading advertising.'" *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003) (quoting § 17200). Testimony by Allstate's employees and the Cecenas did not create an inference that Allstate, in this case or as a general practice, discouraged disclosure of the different kinds of ALE benefits. The Cecenas, not Allstate, suggested staying with their son; they never made their dissatisfaction known to Allstate; and they proposed the amount to "cash out" their ALE benefit, which Allstate paid.

VI. Evidentiary Rulings

A. Summary Judgment

The district court stated in its order granting summary judgment that "its analysis of the motion

would be the same even if the documents in question were considered." The Cecenas therefore cannot demonstrate prejudice from the district court's exclusion of the documents. *See Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004).

B. Trial

Expert testimony as to industry standards was relevant only to support whether Allstate's actions were unreasonable. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004). It did not, however, compensate for the Cecenas' lack of proof that Allstate's actions were deliberate rather than the product of mistake or negligence. The district court did not err by excluding the testimony.

Nor did the district court abuse its discretion by sustaining Allstate's objections to the admissibility of a document obtained from Allstate during discovery. Federal rules of evidence, not state rules, ordinarily apply to diversity actions in federal court, except when "state evidence rules . . . are intimately bound up with the state's substantive decision." *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003). California Evidence Code § 623, relied upon by the Cecenas, is a procedural sanction for parties during litigation, untethered to California's substantive interests.

AFFIRMED.

APPENDIX B

E-Filed 11/2/05

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

Case Number C 05-03178-JF

[Filed November 2, 2005]

EDUARDO CECENA and MARIA CECENA	)
Plaintiffs,	)
v.	)
ALLSTATE INSURANCE COMPANY, MICHAEL ROMERO and DOES 1-100, inclusive,	)
Defendants.	)

ORDER[1] (1) GRANTING DEFENDANT MICHAEL ROMERO'S MOTION TO STRIKE; AND (2) DENYING PLAINTIFFS' MOTION FOR REMAND
[Docket Nos. 12 & 20]

Defendant Michael Romero ("Romero") moves to strike the complaint brought against him by Eduardo Cecena and Maria Cecena (collectively "Plaintiffs") pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In the alternative, Romero moves to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs simultaneously move to remand the instant action pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1447(c), and ask the Court to take judicial notice of the papers submitted in support of their motion for remand for use in their opposition to Romero's motion to strike or dismiss. Having considered the briefs, relevant evidence, and the arguments of counsel at the hearing on October 28, 2005, the Court will GRANT Romero's motion to strike and DENY Plaintiffs' motion for remand for the reasons set forth below.

I. BACKGROUND

On February 15, 2005, Plaintiffs filed suit in the San Benito Superior Court against Allstate Insurance Company ("Allstate") and Romero (collectively "Defendants"), alleging claims for breach of contract,

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[1] This disposition is not designated for publication and may not be cited.

bad faith and negligence.[2] *See* San Benito Superior Court Case No. CU-05-00019; *see also* Complaint, ¶¶ 6-15. Plaintiffs' claims stem from Allstate's alleged failure timely to pay benefits owed to Plaintiffs under a homeowners insurance policy when Plaintiffs' home sustained fire damage. Complaint, ¶¶ 8, 12. In addition, Plaintiffs allege that Romero, the Allstate sales agent who serviced Plaintiffs' policy, negligently breached his duty to advise Plaintiffs of the coverage requirements for their home. *Id.*, ¶ 14. On June 2, 2005, Defendants separately demurred to the complaint. On July 14, 2005, the Superior Court sustained Allstate's demurrer with leave to amend and sustained Romero's demurrer without leave to amend, expressly dismissing the complaint in its entirety as to Romero. Notice of entry of the Superior Court's order was filed by Defendants on July 25, 2005.

On July 26, 2005, Plaintiffs filed a first amended complaint ("FAC") in the Superior Court. Plaintiffs' FAC continued to include Romero as a defendant, alleging new claims against him for fraud and negligent misrepresentation. *See* FAC, ¶¶ 29-44. Plaintiffs admit that "[t]echnically, [they] should have sought Leave to Amend from the court" before filing the new causes of action against Romero. Motion to Remand, at 2. Nonetheless, Plaintiffs maintain that by including new causes of action against Romero, they sought to "save judicial resources." *Id.* Defendants

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[2] Plaintiffs are, and for all relevant times have been, residents of the State of California. Allstate is, and for all relevant times has been, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Northbrook, Illinois. Romero is, and for all relevant times has been, a resident of the State of California.

contend that Plaintiffs included Romero as a defendant in the FAC in order to defeat diversity and to preclude Allstate from removing the instant case to federal court.

On August 4, 2005, Plaintiffs learned that counsel for Allstate intended to remove the action to federal court, given Allstate's belief that the new causes of action against Romero were not permitted. *Id.*, at 3. On the following day, Allstate filed a notice of removal with this Court pursuant to 28 U.S.C. § 1441(a).[3] Hours later, Plaintiffs attempted to file a motion with the Superior Court seeking leave to file their claims for fraud and negligent misrepresentation against Romero.[4] *See* Shepardson Dec., ¶ 12, Ex. 1. Although Plaintiffs' motion and supporting papers initially were accepted and file-stamped by the Superior Court, the filing subsequently was vacated because it occurred after the case had been removed to federal court. *See* Woelfel Dec., ¶ 3, Ex. B.

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[3] According to Allstate's notice of removal, federal jurisdiction is based upon diversity of citizenship and satisfaction of the amount in controversy requirement. *See* 28 U.S.C. § 1332(a). Plaintiffs are California residents and Allstate is an Illinois corporation. *See supra*, note 2. Plaintiffs served Statements of Damages — Eduardo Cecena on July 8, 2005 and Maria Cecena on July 12, 2005 — indicating that each Plaintiff seeks to recover more than $75,000, exclusive of costs and interest.

[4] Plaintiffs also refer to this filing as a "Motion for Reconsideration" pursuant to Cal. Civ. Proc. Code § 1008.

II. DISCUSSION

A. Motion for Remand

1. *Legal Standard*

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove an action to federal court if the plaintiff could have initially filed the action in federal court. *See Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393 (9th Cir. 1988). A party may file an action in federal court if there is diversity of citizenship among the parties or if the action raises a substantial federal question. *Ethridge*, 861 F.2d at 1393. The party invoking the removal statute bears the burden of establishing federal jurisdiction. *Id.* The removal statute is strictly construed against removal. *Id.* The matter therefore should be remanded if there is any doubt as to the existence of federal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

2. *Compliance With Removal Procedure*

Plaintiffs ask this Court to remand this action to the Superior Court so that their motion for leave to amend and motion for reconsideration may be heard. Plaintiffs contend that by removing the action from the Superior Court before the time period had run for a motion for reconsideration, Allstate sought to "usurp Plaintiffs' rights by denying them an opportunity to defeat diversity." Motion to Remand, at 4. In other words, Plaintiffs maintain that Allstate's removal was premature. Although Plaintiffs do not cite any authority holding that removal is prohibited prior to the expiration of the time period for filing of a motion for reconsideration, Plaintiffs argue that in order for

removal to occur, diversity must exist at the time the action was commenced and at the time of removal. *Id.*, at 3 (citing *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298, 301 (2nd Cir. 1994)). Thus, Plaintiffs imply that removal is inappropriate in this case, given that complete diversity did not exist at the time the action was commenced in the Superior Court.

Although their general statement of the law is correct, Plaintiffs fail to discuss the exception set forth in 28 U.S.C. § 1446(b), which states in pertinent part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). While this section initially appears to permit Allstate's removal, an examination of cases construing § 1446(b) cast doubt upon its applicability in the present context. Under the traditional rule, only a voluntary act of the plaintiff justifies removal of an action not initially removable, such as in the case of a settlement or stipulation of dismissal. *See Whitcomb v. Smithson*, 175 U.S. 635, 638 (1900) (holding that a ruling on the merits, adverse to plaintiff and without his assent did not render the case removable). This traditional rule

serves to "promote judicial efficiency by 'prevent[ing] removal of those cases in which the issue of the resident defendant's dismissal has not been finally determined in the state courts.'" *Self v. General Motors Corp.*, 588 F.2d 655, 658 (9th Cir. 1979) (quoting *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967)). There is some dispute as to whether the traditional rule survives, given the statement in § 1446(b) that removal is permitted after receipt of an "order" from which the case is or has become removable. However, the majority of courts, including the Ninth Circuit, have concluded that voluntary abandonment of a claim is required in order to remove a case under § 1446(b). *See Self*, 588 F.2d 655; *Insigna v. LaBella*, 845 F.2d 249 (11th Cir. 1988); *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979); *see also* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3723 n.22 (3d ed. 1998). In light of the foregoing authorities and the undisputed fact that Romero was dismissed from the Superior Court case on a contested demurrer, Allstate's notice of removal arguably was not authorized by statute.

3. *Fraudulent Joinder*

Nonetheless, the Court concludes that removal is appropriate on the alternate ground of fraudulent joinder. "Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). Plaintiffs' FAC alleges that Romero, an "authorized agent" for Allstate, was "acting within the

scope of [his] authority" when he made the purported misrepresentations to Plaintiffs. FAC, ¶ 4. Under California law, it is "well established" that an insurance agent has no liability for acts undertaken within the scope of his or her agency. *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir. 2003); *see also Icasiano v. Allstate Ins. Co.*, 103 F. Supp. 2d 1187, 1189-90 (N.D. Cal. 2000); *Good v. Prudential Ins. Co.*, 5 F. Supp. 2d 804, 807-09 (N.D. Cal. 1998); *Charlin v. Allstate Ins. Co.*, 19 F. Supp. 2d 1137, 1142 (C.D. Cal. 1998); *Gasnick v. State Farm Ins. Co.*, 825 F. Supp. 245, 249 (E.D. Cal. 1992). In light of these authorities, Plaintiffs' attempt to amend its Complaint in order to state new causes of action against Romero for fraud and negligent misrepresentation was futile.[5] The Court concludes that such failure is obvious according to settled legal principles, and accordingly that Plaintiffs' inclusion of Romero as a defendant was fraudulent.

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[5] Plaintiffs cite two cases which purportedly hold that an insurance agent may be held personally liable for acts committed within the scope of her agency. However, these cases are clearly distinguishable. In *Barbara L. McNeill v. State Farm Life Ins. Co.*, 116 Cal. App. 4th 597 (2004), the court relied upon an important factual distinction, noting the "present complaint's indication of a long-term relationship between [the agent] and plaintiff." *Id.* at 603. Likewise, in *Doctor's Co. v. Superior Court*, 49 Cal. 3d 39 (1989), the plaintiff sought to impose liability upon various agents of the insurance company for engaging in an alleged conspiracy to violate California Insurance Code § 790.03. In the instant action, Plaintiffs have not alleged a conspiracy to commit fraud or negligent representation.

B. Motion to Strike

The Court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike generally will not be granted unless it is clear that the matter to be stricken could not have any possible bearing on the subject matter of the litigation. *LeDuc v. Kentucky Central Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). Allegations "supplying background or historical material or other matter of an evidentiary nature will not be stricken unless unduly prejudicial to defendant." *Id.* Moreover, allegations that contribute to a full understanding of the complaint as a whole need not be stricken. *Id.*

As described above, the Superior Court sustained Romero's demurrers without leave to amend, expressly dismissing the Complaint in its entirety as to Romero. In defiance of the court's Order, Plaintiffs subsequently filed a FAC alleging new claims against Romero for fraud and negligent misrepresentation. Because these new claims were expressly prohibited by the court and were filed in violation of California law, the FAC is a nullity as to Romero. Accordingly, Romero's motion to strike is granted.

III. ORDER

(1) Defendant Romero's motion to strike Plaintiffs' fourth and fifth causes of action is GRANTED; and

(2) Plaintiffs' motion for remand is DENIED.

DATED: November 2, 2005

/s/ electronic signature authorized
JEREMY FOGEL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-16710
D.C. No. 5:05-cv-03178-JF
Northern District of California, San Jose

[Filed January 5, 2010]

EDUARDO CECENA; MARIA CECENA,

Plaintiffs - Appellants,

v.

ALLSTATE INSURANCE COMPANY; MICHAEL ROMERO,

Defendant - Appellee.

ORDER

Before: SCHROEDER and BERZON, Circuit Judges, and STROM, District* Judge.

* The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

The panel has unanimously voted to deny Plaintiffs-Appellants' petition for rehearing. Judge Berzon and Judge Schroeder have voted to deny the petition for rehearing en banc. Judge Strom recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing is **DENIED** and the petition for rehearing en banc is **DENIED**. No further petitions for rehearing or rehearing en banc may be filed.